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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 839

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Petitioner,

v.

JOSEPHINE MESSINA, *Respondent*

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the opinion of respondent, the following questions are presented by this Petition for Certiorari:

1. Does the interpretation by the U. S. District Court and the U. S. Court of Appeals for the District of Columbia Circuit of certain language in an insurance policy present "special and important" reasons for the granting of a writ of certiorari?

2. Should a writ of certiorari be granted for review of a purported "conflict of laws" question where the petitioner, who contends that Japanese law applies, has never offered to prove Japanese law and does not even now contend that the result would be different under Japanese law?

STATEMENT OF THE CASE

Respondent's husband, Salvatore Messina, was killed in an airplane crash on one segment of an air trip from Japan to Washington. Prior to his departure from Japan the deceased purchased an insurance policy for the trip issued by the petitioner and naming the respondent as beneficiary.

Petitioner denied coverage on the ground that the fatal flight was not within the terms of the policy and respondent later brought suit in the U. S. District Court for the District of Columbia seeking to recover the proceeds of the policy. At the trial respondent introduced evidence in support of her position; petitioner offered no evidence. The District Court, in a lengthy opinion, found for the respondent. 228 F. Supp 865 (App. 20-32). Judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit, *per curiam,* with one judge dissenting. 350 F. 2d 458 (App. 11-19).

ARGUMENT

I

The Construction of an Insurance Policy by the District Court and the Court of Appeals Involves No "Special and Important" Reasons Which Would Justify the Granting of a Writ of Certiorari

It is well-established that this Court, in reviewing or deciding whether to review the decisions of the United States Court of Appeals for the District of Columbia Circuit, will exercise great restraint and will review such decisions only where the question presented is one of national importance rather than a matter of local law. *Griffin* v. *United States,* 336 U.S. 704, 716, 93 L. ed. 993, 1000 (1949); *Fisher* v. *United States,* 328 U.S. 463, 476, 90 L. ed. 1382, 1390 (1946); *cf. Del Veccio* v. *Bowers,* 296 U.S. 280, 80 L. ed. 229 (1935). It is similarly axiomatic that certiorari will not be granted where the question presented, even if it involves a Constitutional issue, is of importance only to the litigants. *Rice* v. *Sioux City Memorial Parks Cemetery,* 349 U.S. 70, 99 L. ed. 897 (1955).

The petitioner itself recognizes that "the only issue in this case is whether the insurance policy covered the fatal flight." (Pet. 9). Thus, no statute or principle of Common Law is involved but simply the construction of a contract between two private parties. This issue has been fully briefed and argued before the United States District Court and the United States Court of Appeals for the District of Columbia Circuit, and both Courts have ruled adversely to the petitioner, presenting no issue which would justify the granting of a writ of certiorari.

In an effort to introduce some sense of national significance into this case, petitioner states that the lower

courts' finding that the fatal flight was one within the terms of the policy is in conflict with cases holding that the Government may not be bound by the apparent authority of an officer purporting to act in its behalf. (Pet. 8-9). In all the cases cited by the petitioner, however, the Government was a party to the litigation and was raising its agent's lack of authority to bind it upon a particular contract. In the instant case, on the contrary, the Government is not a party and has never taken any official position in this litigation or elsewhere with respect to the validity of the document in question. As was stated by Mr. Justice Jackson, dissenting in *Federal Crop Insurance Corporation* v. *Merrill,* 332 U.S. 380, 387-388, 92 L. ed. 10, 17 (1947), the defense of lack of actual authority of a Government official is a "one way street" upon which only the Government may travel. Even a party having direct contractual relations with the United States may not raise the issue of the Government agent's lack of authority. *Perkins* v. *Lukens Steel Company,* 310 U.S. 113, 127-129, 84 L. ed. 1108, 1114, 1116 (1940); *Hartford Accident & Indemnity Company* v. *United States,* 130 Ct. Cls. 490, 493 (1955). Thus, the holdings of the District Court and the Court of Appeals in this case have no application to the field of Federal Government contract law.

In a further attempt to breathe some air of broad importance into this case, the petitioner argues that the decision of the courts below will tend to raise the cost of accident insurance (Pet. 11). Petitioner complains that:

> "* * * the holding below pays no heed to the actuarial factors that enter into the obviously greater risks of the relatively unregulated nonscheduled air taxi." (Pet. 11-12).

The reason that the courts below did not consider the "actuarial factors" is quite simple: Petitioner presented no such evidence. The only evidence on the issue of the riskiness of the airline upon which the insured lost his life was introduced by the respondent and showed that this airline, by reason of the contract with MATS, was held to a standard of safety substantially in excess of the usual requirements of the Federal Aviation Administration. (R. 98-104; 125-128). The petitioner, having elected to offer no evidence upon this issue—or upon any issue—cannot now be heard to rely upon some vague, unspecified actuarial factors which it claims will have some effect upon insurance rates. These factors being within the peculiar knowledge of the petitioner and the petitioner having failed to offer them in evidence, it can be assumed that such factors would be unfavorable to the petitioner's case. *Washington Gas Light Company* v. *Biancaniello,* 87 U.S. App. D.C. 164, 167, 183 F. 2d 982, 986 (1950).

II

The Purported "Conflict of Laws" Issue Raised by Petitioner Has No Effect Upon the Outcome of This Case and, in Any Event, Is a Matter of Local Law Which Is Not a Proper Subject for Review by Writ of Certiorari

Petitioner contends that both the District Court and the United States Court of Appeals erred in ruling that Japanese law need not be applied to the interpretation of an insurance policy purchased by an American citizen, en route to the United States, from an American company, on a United States Air Force Base in Japan and naming an American citizen as beneficiary. The short answer to this contention is that the petitioner has never demonstrated, nor even argued, that the application of Japanese law would in any way

change the outcome of this case. Thus, there is no real "conflict" of laws question presented since no difference in result is alleged.

Even if the petitioner had offered some evidence to show that a different result would have been reached under Japanese law, thus presenting a true "conflict of law" question, this Court has consistently held that there need be no uniformity or consistency among the conflict of laws rules adopted by the various lower courts so long as the full faith and credit clause, or some other Constitutional provision, is not violated. *Wells* v. *Simonds Abrasive Company,* 345 U.S. 514, 516, 97 L. ed. 1211, 1215 (1953); *Clay* v. *Sun Insurance Office,* 377 U.S. 179, 12 L. ed. 2d 229 (1964). Petitioner does not even argue that the "conflict" question allegedly presented here rises to the dignity of a Constitutional issue.

CONCLUSION

This case involves the construction of certain language in an insurance policy which has been fully briefed and argued to both the District Court and the Court of Appeals. The narrow issue upon which both lower courts found for the respondent does not have that importance which would warrant a review by this Court. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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